No. 1[redacted]165

JOHN F. DAVIS,

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1966

FREDERICK B. KROL,

*Petitioner,*

vs.

UNITED STATES OF AMERICA,

*Respondent.*

Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit.

## REPLY BRIEF ON BEHALF OF PETITIONER

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## REPLY BRIEF ON BEHALF OF PETITIONER

### Opinion Below

The opinion of the Court of Appeals is reported at 374 F.2d 776.

## REASONS RELIED ON FOR ALLOWANCE OF THE WRIT

1.

**The investigating agent's narration of petitioner's refusal to talk with an FBI agent until he had consulted with an attorney—thrice repeated—invaded petitioner's constitutional rights.**

It was the opinion of the Court of Appeals (Pet. App. 7) and the argument of the government here (G. Br. 6-7) that the admittedly impermissible revelations of refusal to talk about the accusations did not prejudice the defendant because this was a bench trial and because the trial court stated that the conversations were revealed "for the purpose of showing whether or not [the FBI agent] knew his voice when he heard him . . ."

We present that it was wholly unnecessary for the agent to be permitted, over objections, to reveal the *content* of the conversations in order to testify that he recognized defendant's voice. The Court of Appeals said this was improper: ". . . resort to this strategy for the purpose of bringing the content of the conversations to the Court's attention is to be condemned." (Pet. App. 7). But, "This was a bench trial, and we do not regard the impropriety as constituting prejudicial error which requires a reversal." (Pet. App. 7)

Where errors of constitutional dimension occur, the petitioner's constitutional rights were violated—whether his trial was by jury or by bench.

2.

**The evidence of electronic eavesdropping conducted here violated a special state statute.**

Where federal officers violated the criminal laws of a State in the gathering of evidence, such evidence ought not be permitted in a federal prosecution.

In the original petition, we pointed out that your Honors suggested in *Lopez* v. *United States*, 373 U.S. 427, 440, that if eavesdropping devices were used in violation of some statute or rule of procedure, that the practice might taint the admissibility of such evidence.

We have demonstrated that federal officers violated the criminal statutes of the State of Illinois (Chap. 38, Section 14, Ill. Rev. Stat. 1963) and that the Supreme Court of Illinois has so interpreted that conduct such as that of the federal agents and officers here were violative of the statutes. *People* v. *Kurth*, 34 Ill. 2d 387, 216 N.E. 2d 154.

In its brief in opposition, the government misreads the holding in *Kurth*. The government states that, "... the Illinois Supreme Court did not hold that recording a conversation in the circumstances involved here constitutes a violation of the eavesdropping statute ..." (G. Br. 8) It is precisely what the Illinois Supreme Court did hold.

In *Kurth*, a town officer, one Smith, of a village in Cook County, Illinois, taped his conversations with the defendant Kurth regarding bribes and kickbacks to be paid. The facts with respect to electronic eavesdropping are identical to the case at bar. "Prior to the meeting, Smith concealed a small radio transmitter on his person and a receiver and tape recorder had been installed in Smith's office in the same building. The second and third recordings were of

telephone conversations between Smith and a secretary from whom a kickback was allegedly to be obtained and between Smith and Kurth. These recordings were made with the aid of an electronic device* which made it possible to hear both sides of the telephone conversation. The last recording was of a conversation between Smith, Kurth and the secretary and was made in the same manner as the first recording. All these recordings were admitted in evidence over the defendants' objections." (216 N.E. 2d 157).

The Supreme Court of Illinois held, 216 N.E. 2d 158:

> "It seems to us that the reasonable construction of the statute, which will insure the right of privacy, is that any party who has not consented to the recording or transmission of his conversation may bar its admission in evidence against him."

As the petitioner did not consent to the use of such recordings, its use in evidence against him was plainly violative of the State legislative prohibition. The factual situations are identical; and the government's interpretation of the language of the Illinois Supreme Court is completely at variance with the plain holding of that Court.

As this issue will come before this Court again and again, it would aid the administration of criminal justice—at least in the federal district courts of Illinois—for your Honors to speak upon the subject.

And in this connection we call attention to the Court's recent (June 12, 1967) holding in *Berger* v. *State of New York*, (No. 615, Oct. Term 1966) holding that the wiretapping permitted by the New York courts was violative of the Fourth Amendment. Mr. Justice Clark stated, amongst

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* Identical to the one used in the case at bar.

other things, "We are advised by the Solicitor General of the United States that the federal government has abandoned the use of electronic eavesdropping for 'prosecutorial purposes.'"

The case at bar is one in which the government should abandon its prosecution at this level for the reasons stated in the *Berger* opinion.

3.

**The inconsistent verdict rendered by the trial judge ought not to stand.**

**The holding of the Seventh Circuit is in conflict with that of the Second Circuit on this point.**

The government has not answered the contentions made by petitioner in his brief on this point.

Where an inconsistent verdict rendered by a trial judge based on the same set of facts was reversed by the Second Circuit in *United States* v. *Maybury*, 274 F.2d 899, the Seventh Circuit opinion here is in conflict therewith.

The entire thrust of the government's case at trial was that Madda and Krol agreed to bribe Asst. U.S. Atty. Katz. It was the government's contention that the civil case attempting to be settled was Krol's. The meeting between Madda and Katz took place in Krol's law office. According to the government, Krol gave Madda the $200.00 "which he knew was to be given to Katz" (G.Br. 8). Had petitioner been found guilty of conspiracy, and if Krol complained of insufficient evidence, can anyone reading the record imagine that the government would contend—as it now contends—that there was no conspiracy proved?

To ask that question is to receive the obvious answer.

The trial court rendered an inconsistent verdict when it found defendant not guilty of the conspiracy but guilty of aiding and abetting. The Opinion of the Seventh Circuit Court of Appeals holds that there was no inconsistency. That holding is in conflict with *Maybury, supra.* Accordingly, this court should resolve the conflict in the holdings.

## CONCLUSION

For any or all of the foregoing reasons, we respectfully submit your Honors will consider this a fit case to grant its writ of certiorari.

Respectfully submitted,

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